ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1425 (and consolidated cases)

STATE OF TEXAS, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Petitions for Review of Final Actions Promulgated by the United States Environmental Protection Agency

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FINAL BRIEF OF RESPONDENTS

IGNACIA S. MORENO
Assistant Attorney General

MADELINE P. FLEISHER
Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-0242

Of Counsel:
HOWARD J. HOFFMAN
ELLIOTT ZENICK
SARA SCHNEEBERG
Office of General Counsel
United States Environmental Protection Agency

October 12, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondents acknowledges that Petitioners' Brief sets out the parties, rulings and related cases.

CORPORATE DISCLOSURE STATEMENT

Respondents are a government agency and the Administrator of said agency for which a corporate disclosure statement is not required.

So certified this 12th day of October, 2012, by

/s/ *Madeline Fleisher*
Madeline Fleisher
Counsel for Respondents

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TERMS

Act:	Clean Air Act, 42 U.S.C. §§ 7401-7671q
APA:	Administrative Procedure Act
BACT:	Best Available Control Technology
CAA:	Clean Air Act, 42 U.S.C. §§ 7401-7671q
FIP:	Federal Implementation Plan
GHG:	Greenhouse gas
NAAQS:	National Ambient Air Quality Standards
PSD:	Prevention of Significant Deterioration, 42 U.S.C. §§ 7470-7492
RTC:	Response to Comments
SIP:	State Implementation Plan
TITLE V:	42 U.S.C. §§ 7661-7661f
TPY:	Tons per year

JURISDICTION

As explained *infra* at 24-27, Petitioners lack standing, and their challenge to the Interim Rule is moot. If Petitioners have standing, the Court has jurisdiction to review the Final Rule under 42 U.S.C. § 7607(b).

STATUTES AND REGULATIONS

See attached Addendum for relevant statutes and regulations.

STATEMENT OF ISSUES

1. Whether Petitioners have standing given that the injuries they assert are either non-concrete or are not caused by the challenged rules?

2. Whether Petitioners' challenge to an interim rule issued without public notice and comment is moot, where no action was taken under the interim rule during the four months it was in effect, and where the interim rule has been superseded by a final notice-and-comment rule?

3. Section 110(k)(6) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7410(k)(6), authorizes the Administrator of the Environmental Protection Agency ("EPA" or "Agency") to "revise" EPA actions, including the approval of a CAA state implementation plan ("SIP"), "[w]henever the Administrator determines that the Administrator's action . . . was in error." Does this provision allow EPA to

revise a SIP approval when EPA determines that it mistakenly approved a SIP that did not meet the CAA requirements applicable at the time of the original approval?

4. At the time of EPA's approval of Texas's SIP provisions relating to prevention-of-significant-deterioration ("PSD") permitting, EPA had established that the CAA PSD provisions apply to all pollutants regulated under the Act, including newly regulated pollutants. Did EPA reasonably determine under 42 U.S.C. § 7410(k)(6) that this approval "was in error" because Texas's SIP did not contain any mechanism for addressing pollutants that become newly regulated under the CAA?

5. Whether EPA had good cause to promulgate an interim rule without public notice and comment to revise the approval of Texas's PSD SIP and promulgate a federal CAA implementation plan, where Texas could not issue valid PSD permits to greenhouse-gas-emitting sources under its SIP as of January 2, 2011, and EPA did not know it would be necessary to utilize its error correction authority to address this problem until after October 4, 2010?

STATEMENT OF THE CASE

I. The Clean Air Act

Congress enacted the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7401-7671q, to establish a comprehensive program for controlling and improving air

quality in the United States. *NRDC v. Gorsuch*, 685 F.2d 718, 721 (D.C. Cir. 1982). Under Title I of the Act, EPA is charged with identifying air pollutants that endanger public health and welfare, and formulating National Ambient Air Quality Standards ("NAAQS") that specify the maximum permissible concentrations of those pollutants (known as "criteria" pollutants).[1] 42 U.S.C. §§ 7408-7409. EPA also regulates non-NAAQS air pollutants under provisions such as 42 U.S.C. § 7412, regarding hazardous air pollutants, and 42 U.S.C. § 7521(a)(1), regarding motor vehicle emissions.

A. Prevention of Significant Deterioration

As part of the 1977 CAA Amendments, Congress added Title I, Part C to the Act, setting forth a prevention-of-significant-deterioration ("PSD") program, 42 U.S.C. §§ 7470-7492, regulating stationary sources in areas of the country designated as being in "attainment" or "unclassifiable" for any NAAQS pollutant. 42 U.S.C. §§ 7407(d)(1)(A), 7471, 7475(a). Within such areas, no "major emitting facility" – defined as a stationary source that emits or has the potential to emit 100 or 250 tons per year ("tpy") (depending on the type of source) of "any air pollutant," *id.* § 7479(1) – "may be constructed . . . unless . . . a permit has been issued for such proposed facility in accordance with this part [the PSD provisions]"

[1] EPA has designated six NAAQS pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. *See* 40 C.F.R. pt. 50.

and that permit meets certain substantive requirements. *Id.* § 7475(a)(1); *see also id.* § 7477. Those substantive requirements are contained in section 165(a)(1)-(8), 42 U.S.C. § 7475(a)(1)-(8). Notable here is that major emitting facilities are required to implement best available control technology ("BACT") "for each pollutant subject to regulation under this chapter." 42 U.S.C. § 7475(a)(4). Since 1978, EPA has interpreted these provisions to require that the PSD program address "any air pollutant" that is "subject to regulation under the CAA" (unless the pollutant is one for which an area has been designated non-attainment, in which case that pollutant is subject to a different regulatory program under 42 U.S.C. §§ 7501-7515). *See* 40 C.F.R. § 52.21(b)(1), (50)(iv).

B. State Implementation Plans

Under the CAA, "the states and the federal government are to be partners in the task of improving the nation's air quality." *Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983). The Act gives States primary responsibility for formulating particular pollution control strategies to ensure that NAAQS and other CAA requirements are achieved, embodied in a set of state laws and regulations called a state implementation plan, or "SIP." 42 U.S.C. § 7410(a); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976). However, the CAA "subject[s] the States to strict minimum compliance requirements." *Id.* at 256-57. EPA remains

"the ultimate supervisor" under the CAA, responsible for interpreting the Act's requirements as well as "for approving state plans and for stepping in, should a state fail to develop or to enforce an acceptable plan." *Duquesne*, 698 F.2d at 471. EPA also retains enforcement authority under the Act, including specific authority to ensure compliance with the CAA's PSD requirements. *See* 42 U.S.C. §§ 7413, 7477.

The process for establishing SIPs is governed by 42 U.S.C. § 7410. First, any SIP or SIP revision proposed by a State must undergo "reasonable notice and public hearings." 42 U.S.C. § 7410(a), (*l*). The State must also submit SIPs and SIP revisions for EPA review to determine whether they meet the applicable CAA requirements. *Id.* § 7410(a), (k), (*l*).

Section 7410(a)(2) outlines the substantive requirements for a SIP, including that a SIP must implement the CAA PSD requirements by incorporating "a permit program as required in part[] C . . . of this subchapter [the PSD provisions]" and by "meet[ing] the applicable requirements of . . . part C of this subchapter." 42 U.S.C. § 7410(a)(2)(C), (J). Section 7471 further provides that a SIP must "contain . . . measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality." 42 U.S.C. § 7471. EPA has promulgated 40 C.F.R. § 51.166 to specify

the PSD provisions that must be contained in a SIP. Additionally, a SIP must provide "necessary assurances that the State . . . will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan . . . ." 42 U.S.C. § 7410(a)(2)(E)(i).

EPA reviews a State's proposed SIP provisions under section 7410(k). Once EPA has determined that a SIP submission is complete, the Agency must act on the submission within 12 months. 42 U.S.C. § 7410(k)(1), (2). EPA must approve the submission if it "meets all of the applicable requirements of this chapter [the CAA]." *Id.* § 7410(k)(3). To the extent the SIP submission "would interfere with any applicable requirement" of the CAA, EPA must disapprove it, *id.* § 7410(*l*), which may result in a partial approval and partial disapproval. *Id.* § 7410(k)(3). Where EPA finds that a State has failed to make a required SIP submission, that the required submission is not complete, or the Agency disapproves all or part of a SIP submission, then 42 U.S.C. § 7410(c)(1) requires EPA to promulgate a federal implementation plan ("FIP") within two years to implement the CAA requirements that the State has failed to address.

This litigation focuses on CAA section 110(k)(6), 42 U.S.C. § 7410(k)(6)

– entitled "Corrections" – which provides for revision of EPA's actions regarding a SIP submission whenever the Agency determines that such an action "was in error":

> Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State.

42 U.S.C. § 7410(k)(6).

Section 7410 also addresses the need for SIP revisions. Section 7410(a)(1) requires a State to submit a SIP revision after the promulgation of a NAAQS. 42 U.S.C. § 7410(a)(1). Section 7410(k)(5) authorizes EPA to issue a call for a SIP revision (a "SIP call"), along with a deadline for submission of the revision, whenever the Agency finds that a SIP has become "substantially inadequate" to comply with the CAA's requirements. 42 U.S.C. § 7410(k)(5). Finally, a State may submit a proposed revision of its own accord for review under section 7410(k).

II. History of the Texas PSD SIP

EPA approved Texas's PSD SIP provisions in 1992. 57 Fed. Reg. 28,093 (June 24, 1992) (approving 31 Tex. Admin. Code § 116.3(a)(13) (1992),

Supplemental Appendix ("SA") 3, now codified at 30 Tex. Admin. Code § 116.12, JA703). Those provisions incorporated by reference the federal PSD regulations codified at 40 C.F.R. § 52.21. *See* 54 Fed. Reg. 52,823, 52,824/1 (Dec. 22, 1989). Consistent with EPA's longstanding interpretation of the CAA, the Agency's regulations at that time defined a "major stationary source" as a source emitting "any pollutant subject to regulation under the Act" beyond the 100/250 tpy thresholds. 40 C.F.R. § 52.21(b)(1)(i) (1992); *see also id.* § 51.166(b)(1) (1992) (same definition must be used in SIPs).

During the SIP submission process, Texas clarified that its incorporation of this federal regulation by reference was not meant to operate prospectively, but rather to reference the regulations as they existed at the time. Letter from Texas Air Control Board to EPA 1 (Oct. 24, 1986), JA101. The State subsequently amended its PSD rule to include a reference date, and further updated that reference date when a new pollutant, particulate matter, became subject to federal regulation during the SIP approval process. *See* 57 Fed. Reg. at 28,094/2.

III. Greenhouse Gas Regulation Under the Clean Air Act

A. EPA Regulation of Greenhouse Gases

In 2007, the Supreme Court held that greenhouse gases ("GHGs") may be regulated as an "air pollutant" under the CAA. *Massachusetts v. EPA*, 549 U.S.

497, 528-29 (2007). EPA subsequently determined that GHGs "may reasonably be anticipated" to endanger public health and welfare, triggering regulation of GHG emissions from motor vehicles under 42 U.S.C. § 7521(a)(1). 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) ("Endangerment Finding"). EPA then issued motor vehicle standards for GHGs, to take effect on January 2, 2011. 75 Fed. Reg. 25,324, 25,326 (May 7, 2010) ("Tailpipe Rule").

In its April 2, 2010 "Timing Rule," EPA recognized that regulation of GHG emissions under the CAA as of January 2, 2011 would automatically trigger regulation of GHG-emitting stationary sources under 42 U.S.C. § 7475. 75 Fed. Reg. 17,004, 17,006, 17,019/3, 17,023 (Apr. 2, 2010). EPA also acknowledged that immediately implementing PSD and Title V (another CAA permitting program triggered by the Tailpipe Rule) for *all* of the sources meeting the statutory thresholds for GHG emissions would "overwhelm[ ] the resources of permitting authorities and severely impair[ ] the functioning of the program[ ]." 75 Fed. Reg. 31,514 (June 3, 2010). EPA therefore promulgated the "Tailoring Rule" to establish an effective administrative process by which PSD and Title V permit requirements for GHGs could be phased in after January 2, 2011. *Id*. at 31,516.

A number of petitioners, including Texas, challenged these four rules, along with EPA's interpretation of the CAA PSD requirements as applying to major

sources of *any* air pollutant regulated under the CAA, arguing in part that the PSD requirements should not cover sources that are "major emitting facilities" due only to their emission of non-NAAQS pollutants such as GHGs. This Court upheld EPA's application of the CAA in full in *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) ("*CRR*").

CRR affirmed EPA's interpretation of the definition of "major emitting facility" in 42 U.S.C. § 7479(1) – a stationary source emitting threshold amounts of "any air pollutant" in an attainment or unclassifiable area – as unambiguously including a major source of *any* regulated air pollutant, even non-NAAQS pollutants. *Id.* at 133; *see generally id.* at 133-36. This Court accordingly recognized that "greenhouse gases are now a 'pollutant subject to regulation under' the [Clean Air] Act, and as required by the statute itself, any 'major emitting facility' covered by the PSD program must install BACT for greenhouse gases." *Id.* at 133. *CRR* therefore confirmed EPA's position that "once the Tailpipe Rule took effect and made greenhouse gases a regulated pollutant under Title II of the Act, the PSD program automatically applied to facilities emitting over 100/250 tpy of greenhouse gases." *Id.*

B. Implementation of Greenhouse Gas Requirements

1. The Greenhouse Gas SIP Call

Accordingly, as of January 2, 2011, no construction or modification of a facility emitting GHGs above the applicable thresholds could commence absent a PSD permit addressing those GHG emissions. *See* 42 U.S.C. §§ 7475(a)(1), (4); 7479(1); *CRR*, 684 F.3d at 133. States whose SIPs did not cover GHGs as of January 2, 2011 would thus be unable to issue valid PSD permits to GHG-emitting sources consistent with the CAA PSD provisions.

EPA therefore requested in promulgating the Tailoring Rule that States with approved PSD programs submit letters by August 2, 2010, explaining whether the State's PSD program would apply to GHG-emitting sources. 75 Fed. Reg. at 31,525-26. If not, EPA asked the States to report what action would be necessary to revise the State's PSD SIP to implement the CAA's requirements with respect to GHGs. *Id.* These letters revealed that thirteen States lacked the authority to apply their PSD programs to GHG-emitting sources.

Texas was among those thirteen States. Its letter stated that "Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions." Letter from

Texas Commission on Environmental Quality to EPA 1 (Aug. 2, 2010) ("August 2, 2010 Letter"), JA67. Outlining various arguments against applying its PSD rules to GHG-emitting sources, Texas explained that it would not revise its SIP to "adopt[] the EPA's definition of 'subject to regulation' without directly raising any of our substantive objections to" the Endangerment Finding, Tailpipe Rule, Timing Rule, and Tailoring Rule. *Id.* at 6, JA72.

Once informed of the status of the States whose PSD programs did not address GHG-emitting sources, EPA acted to fill the gap in those States' permitting authority by issuing a SIP call under CAA section 110(k)(5), 42 U.S.C. § 7410(k)(5). On September 2, 2010, EPA proposed a rule finding that States whose PSD programs did not address GHG-emitting sources were "substantially inadequate" to comply with the requirements of the CAA because they did not apply PSD to a pollutant "subject to regulation" under the Act in accordance with 42 U.S.C. § 7475, and calling for those States to submit SIP revisions to cure that inadequacy. 75 Fed. Reg. 53,892 (Sept. 2, 2010).

Pursuant to section 7410(k)(5)'s mandate to EPA to set "reasonable deadlines (not to exceed 18 months . . .)" for submission of the required SIP revision, the Agency asked the covered States to submit corrective revisions within 12 months (by December 2011). 75 Fed. Reg. at 53,896. However, to prevent a

gap in the availability of permitting authority pending submission and approval of the revision, EPA told these States that they could accept a much shorter deadline, as early as December 22, 2010. *Id.* If a State opted for a December 22, 2010 deadline and did not submit the required revision by that date, EPA would, as authorized by 42 U.S.C. § 7410(c), immediately issue a finding of failure to submit a required SIP revision and then issue a FIP (proposed alongside the SIP call) that would allow EPA to act as a supplemental PSD permitting authority for GHG-emitting sources, thereby preventing any lapse in PSD permitting for the State in question. *See id.* at 53,901, 53,904-05; *see also* 75 Fed. Reg. 53,883 (Sept. 2, 2010) (proposed FIP).

EPA accordingly requested that States for which the Agency was proposing a SIP call "identify the deadline – between 3 weeks and 12 months from the date of signature of the final SIP Call – that they would accept for submitting their corrective SIP revision." *Id.* at 53,896. Twelve responded either by agreeing to accept an early SIP submittal deadline, or by informing EPA that an early deadline was not necessary to avoid hardship to sources subject to their PSD programs. 75 Fed. Reg. 77,698, 77,711-12 (Dec. 13, 2010). Texas alone neither accepted an early submittal deadline nor assured EPA that it would be able to revise its SIP expeditiously. The State's comments on the SIP call, submitted on October 4,

2010, presented a number of arguments opposing regulation of GHG-emitting stationary sources, as well as the SIP call itself, without identifying a preferred deadline for submission of a SIP revision before December 2011. *See* Texas SIP Call Comments (Oct. 4, 2010), JA73-80.

EPA finalized the "GHG SIP Call" on December 13, 2010. 75 Fed. Reg. at 77,698. Twelve of the thirteen States subject to the SIP call received submittal deadlines in accordance with their preferences. *See id.* at 77,712. Texas received the default SIP submittal deadline of December 1, 2011. *Id.* at 77,711.

2. The Interim Final Error Correction Rule

While the SIP call rulemaking was proceeding, Texas was also pursuing its challenge to the Endangerment, Tailpipe, Timing, and Tailoring Rules before this Court. It filed a motion for stay pending appeal in that litigation on September 15, 2010. *Texas v. EPA*, No. 10-1041 (D.C. Cir.), Texas Stay Mot., SA5-67. In that motion, Texas asserted that it would be harmed unless the Court stayed EPA's GHG rules because it would be unable to issue PSD permits for GHG-emitting sources pending either revision of its SIP or promulgation of a FIP covering such sources. *Id.* at 40-41, SA45-46. Texas offered a sworn affidavit attesting that this inability to issue permits "could affect as many as 167 projects within the first year," which "would deprive Texans of jobs constructing or operating new

industrial projects, deprive Texas industry of business opportunities, deprive the State of tax revenues associated with projects, and place Texas at a competitive disadvantage."[2] *Id.* at 41, SA46 (citing Hagle Aff. at 14, SA66).

EPA recognized that under these circumstances, after January 2, 2011 neither Texas nor EPA would have authority to issue valid PSD permits to GHG-emitting stationary sources in Texas seeking such permits. 75 Fed. Reg. at 77,711. Therefore, once aware of Texas's decision not to accept any SIP submittal deadline earlier than December 1, 2011 for the GHG SIP Call, the Agency began considering additional actions to ensure GHG-emitting sources in Texas would be able to obtain permits. *Id.*

To provide the necessary supplement to Texas's permitting authority by the fast-approaching date of January 2, 2011, EPA invoked its authority under CAA section 110(k)(6), 42 U.S.C. § 7410(k)(6), to issue an "Error Correction Rule" determining that its 1992 approval of Texas's PSD SIP "was in error," and revising that approval to be a partial approval and partial disapproval.[3] 75 Fed. Reg. 82,430

[2] This Court denied the stay motions filed in that litigation on December 10, 2010. Nos. 09-1322 *et al.* (D.C. Cir.), December 10, 2010 Order at 3, JA871.

[3] Petitioners imply that EPA misled the Court about its intention to issue this rule in an October 28, 2010 declaration submitted by Assistant Administrator Regina McCarthy as part of the stay briefing in *CRR*. *See* Pet'rs' Br. at 1, 14, 16, 19, 47. Her declaration, along with an attached table, described the then-current "[s]tatus of states" covered by the GHG SIP Call in implementing the PSD requirements for

(Dec. 30, 2010) ("Interim Rule"). At the same time, the Agency promulgated a FIP under 42 U.S.C. § 7410(c), allowing EPA to act as a supplemental PSD permitting authority in Texas with respect to GHGs. *Id.* at 82,430.

a. EPA's Error Determination

As described above, the CAA's PSD requirements automatically apply to any new pollutant that becomes subject to regulation under the Act. Many SIPs incorporate this aspect of the statute by automatically updating to include newly regulated pollutants. Texas's SIP does not. Nor does Texas's SIP address newly regulated pollutants in any other way or provide assurances of the State's authority to update its SIP in this respect, despite the fact that when the State's PSD SIP was originally approved, EPA interpreted the CAA's PSD requirements to

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GHG-emitting sources. McCarthy Decl. at 12, Att. 1, JA284, 304. The table indicated that a FIP could not be promulgated for Texas until December 2, 2011 (the day following Texas's SIP submittal deadline under the SIP call), accurately conveying that Texas did not intend to accept a FIP under the GHG SIP Call prior to December 2, 2011. *Id.* Att. 1, JA304.

Assistant Administrator McCarthy also straightforwardly explained EPA's intention to take further action with respect to Texas, noting that, in the wake of the State's October 4 comments, EPA was in the process of considering future steps to fill the gap in Texas's permitting authority "so as to avoid delays in processing the permitting applications for the sources in the state" seeking PSD permits. *Id.* ¶ 55, JA284. However, EPA had not – in the twenty-four days since it received notice of Texas's decision not to accept an early SIP revision submittal deadline – developed a plan to undertake an error correction rule.

automatically apply to sources of such pollutants. *See* 40 C.F.R. § 51.166(b)(1) (1992), JA392. Therefore, EPA concluded in the Interim Rule that:

> the Texas PSD SIP submittal contained gaps: It did not address the application of PSD to pollutants newly subject to regulation, including non-NAAQS pollutants; and it did not contain any information concerning Texas's methods or timing for doing so. Nor did the program provide assurances that the State had adequate legal authority to apply PSD to such pollutants.

75 Fed. Reg. at 82,449/3-50/1.

Texas's recent statements and actions with respect to GHG regulation brought these gaps to EPA's attention. *See* 75 Fed. Reg. at 82,450/1-3, 82,454/2-3. Meanwhile, Texas's assertions in the *CRR* litigation indicated that if circumstances did not change, as many as 167 construction or modification projects could be delayed by the lack of any entity authorized to issue valid PSD permits to GHG-emitting sources in Texas. *Supra* at 14-15.

Confronted with this situation, EPA acted under section 7410(k)(6) to determine that its full approval of Texas's PSD SIP in 1992, despite the SIP's gaps in addressing then-existing CAA requirements, "was in error." 75 Fed. Reg. at 82,452/1-2. The Agency then "revise[d]" that original approval, 42 U.S.C. 7410(k)(6), changing its approval to a partial disapproval to the extent Texas's PSD program does not address pollutants newly subject to regulation or provide assurances of its legal authority to do so. 75 Fed. Reg. at 82,453/1. EPA left its

approval in place to the extent Texas's PSD program covers pollutants regulated under the CAA. *Id.* As an alternative to its authority under section 7410(k)(6), EPA invoked its inherent authority to reconsider its own actions. 75 Fed. Reg. at 82,453/1-3.

Having corrected its approval of Texas's PSD SIP to be a partial approval and partial disapproval, EPA was required under section 7410(c)(1)(B) to promulgate a FIP, and chose to do so immediately in order to fill the gap in Texas's PSD permitting authority. 75 Fed. Reg. at 82,456/2-3. EPA promulgated a FIP mirroring its PSD regulations in 40 C.F.R. § 52.21, though limited to apply only to GHGs. 75 Fed. Reg. at 82,456/3-57/1. Under this FIP, EPA would "be responsible for acting on permit applications for only the GHG portion of the permit, and the state will retain responsibility for the rest of the permit." *Id.* at 82,457/1 (citation omitted). EPA offered to delegate authority to implement the FIP to Texas, so that Texas rather than EPA would process permit applications under the FIP. *Id.* at 82,458/1. The Agency explained that it would leave the FIP in place "only as long as is necessary for the state to submit and for EPA to approve a SIP revision that includes PSD permitting for GHG-emitting sources." *Id.* at 82,457/3.

b. The "Good Cause" Exception

EPA issued both the Error Correction Rule and FIP as interim final rules without the public notice and comment usually required under the Administrative Procedure Act ("APA"), citing the exception to those requirements "'when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'" 75 Fed. Reg. at 82,458/1 (quoting 5 U.S.C. § 553(b)(3)(B)). EPA found that undertaking notice-and-comment procedures would be both contrary to the public interest and impracticable, given the short time remaining before PSD requirements went into effect for GHG-emitting sources and the economic harm that Texas asserted would result from delays in issuing PSD permits for such sources in the absence of any authority able to issue permits addressing GHGs. 75 Fed. Reg. at 82,458/2-3.

EPA also provided that the Interim Rule would expire as of April 30, 2011, and proposed an Error Correction Rule and FIP mirroring the Interim Rule for public comment. *Id.* at 82,434/2. EPA did not act on any GHG PSD permit applications under the Interim FIP while it was in effect.

3. The Final Error Correction Rule

EPA published the final Error Correction Rule on May 3, 2011. *See* 76 Fed. Reg. 25,178 ("Final Rule"). After considering comments on the proposed rule, the Agency decided to adhere to its error correction determination and repromulgate a

FIP on the same grounds as the Interim Rule. *Id.* at 25,179/1-2. EPA again indicated that it would leave the FIP in place only until Texas submitted, and EPA approved, "a SIP revision that includes PSD permitting for GHG-emitting sources." *Id.* at 25,206/3. Texas has yet to revise its SIP to address GHGs, and therefore the FIP remains in place. Texas also has not sought to assume delegation of GHG permitting authority under the FIP. EPA is therefore currently acting as the authority to issue supplemental PSD permits to GHG-emitting sources otherwise covered by Texas's PSD program, or full permits to sources that Texas does not regulate as "major emitting facilities" because they emit threshold amounts of GHGs alone.

IV. This Litigation

These consolidated cases, brought by Texas and several industry Petitioners, challenge both the Interim and Final Rules.[4] Petitioners Texas, the Utility Air Regulatory Group ("UARG"), and the SIP/FIP Advocacy Group ("SFAG") have also challenged the GHG SIP Call. *See UARG v. EPA*, Nos. 11-1037 *et al.* (D.C. Cir.). Those cases have been fully briefed, although oral argument has not yet been scheduled. Among the issues raised by the petitioners in that litigation is whether the CAA's PSD requirements apply automatically to GHG-emitting

[4] Before these cases were consolidated, EPA sought to dismiss the Interim Rule litigation as moot; the Court referred that motion to the merits panel. Nos. 10-1425 *et al.*, Order (Dec. 1, 2011).

sources as of January 2, 2011. *See* Nos. 11-1037 *et al.*, EPA Br. at 58-60, 79 n.19, JA997-99, 1018.

SUMMARY OF ARGUMENT

The Court should dismiss this suit because Petitioners lack standing to pursue their abstract disagreement with EPA's decision – made in rules already affirmed by this Court in *CRR* – to regulate GHGs under the Clean Air Act. The Error Correction Rules themselves do not harm the Petitioners. EPA promulgated these rules in order to *help* Petitioners deal with the fact that Texas cannot currently issue valid PSD permits to GHG-emitting sources, by enabling EPA to issue PSD permits for GHG-emitting sources – a task which Texas has explicitly refused to undertake – while Texas continues to issue PSD permits for all other PSD pollutants. Vacating the Error Correction Rules will therefore provide no remedy for Petitioners' complaint that GHG-emitting sources in Texas can no longer receive valid PSD permits under the State's SIP alone, a circumstance that is the product of the CAA's own requirements. Instead, such a ruling would merely leave those sources with no way to obtain the necessary permits. At the very least, Petitioners' challenge to the now-expired Interim Rule is entirely moot.

Even if the Court does proceed to the merits, to affirm EPA's actions here it need only apply section 42 U.S.C. § 7410(k)(6)'s plain language expressly

authorizing EPA to correct its action approving a SIP where that action "was in error." The Agency reasonably determined that its approval of Texas's PSD SIP in 1992 was erroneous, since at the time the CAA required PSD to apply to newly regulated pollutants, but the PSD SIP failed to address how Texas would meet that requirement. Although EPA did not recognize this error until Texas relied on the gap in its SIP to refuse to regulate stationary sources of GHG emissions, once the Agency did so, it acted within its discretion under section 7410(k)(6) to correct its mistake in approving the State's flawed SIP. EPA also permissibly relied on the APA's "good cause" exception to issue the Interim Rule, given the pressing need to provide permitting authority in Texas for GHG-emitting sources.

STANDARD OF REVIEW

Review of EPA's error correction determinations under section 7410(k)(6) is governed by the APA, which provides that the Court must determine whether the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The interim and final FIPs are subject to review under CAA section 307(d)(9), which mirrors the APA standard. 42 U.S.C. § 7607(d)(9). The "arbitrary and capricious" standard presumes the validity of agency actions, and a reviewing court is to uphold an agency action if it satisfies "minimal standards of rationality." *Ethyl Corp. v. EPA*, 541 F.2d 1, 36

(D.C. Cir. 1976); *see also Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228-29 (D.C. Cir. 2007). Where EPA has considered the factors relevant to its decision and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Issues regarding statutory interpretation – such as the scope of section 7410(k)(6) – are governed by *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). If the text of the statute resolves the question, then "that is the end of the matter" and "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

This Court has not settled what standard of review to apply to an agency's good cause determination under 5 U.S.C. § 553(b)(3)(B). *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). It is, however, clear that the inquiry into whether "good cause" exists "is inevitably fact- or context-dependent." *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987). The Court therefore should review the "totality of the circumstances" in determining whether

EPA justifiably invoked the "good cause" exception. *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984).

ARGUMENT

I. Petitioners Have Not Alleged Facts Demonstrating Injury Caused by the Error Correction Rules and Therefore Lack Standing.

To satisfy the constitutional requirement that a suit present an actual case or controversy, a petitioner must demonstrate standing by establishing an "injury-in-fact" that: (a) is actual, concrete, and imminent, not abstract or hypothetical; (b) was caused by the conduct complained of; and (c) is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Petitioners bear the burden of averring facts demonstrating these elements in their opening brief. *See Sierra Club v. EPA*, 292 F.3d 895, 901 (D.C. Cir. 2002). Here, Petitioners have not established standing.

Fundamentally, the Error Correction Rules were issued for the express purpose of *benefiting* both Texas and Industry Petitioners by addressing the problem that GHG-emitting sources in Texas could not obtain valid PSD permits under the State's SIP, since it does not apply to GHGs. *See* 75 Fed. Reg. at 82,430/1-2; *CRR*, 684 F.3d at 136 (the CAA's PSD requirements "unambiguously" apply to sources of GHGs). Although the mechanism for this aid technically came in the form of a partial disapproval of Texas's SIP, that titular disapproval in fact

left Texas's own permitting powers untouched. The State is able to exercise exactly the same PSD permitting authority now as it could before the challenged rules were promulgated. The only practical consequence of the Error Correction Rules has been to enable the issuance of supplemental PSD permits for GHG-emitting facilities that would otherwise lie beyond the authority of either EPA or Texas. Thus, while the object of a government action will ordinarily be able to demonstrate that the action has caused injury redressable through judicial review, *see* Pet'rs' Br. at 18, here Texas has not done so. *See Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 802 (D.C. Cir.1985) ("Not all that which may befall an individual is amenable to judicial correction; an abstract 'injury' will find no relief in federal court.").

Texas alleges that it is harmed by the Error Correction Rules because those rules "injure the State's quasi-sovereign interest in regulating air quality within its borders," Pet'rs' Br. at 17, insisting that "vacating the decisions under review will redress the harm that EPA has caused by vacating the actions by which EPA supplanted Texas' right to regulate air quality." *Id.* at 19. But those assertions are conclusory: nowhere does Texas explain how its ability "to regulate air quality" is injured and why those rules are to blame. In fact, Texas remains able to fully implement its existing SIP and to continue regulating air quality with respect to all

the pollutants covered by the State's SIP before PSD began to apply to GHGs. *See supra* at 18-19. The challenged rules have only *supplemented* Texas's regulatory capacity by allowing EPA to issue valid PSD permits to GHG-emitting sources, since Texas asserts it cannot do so and any PSD permits issued by Texas that do not address GHGs would not satisfy the requirements of 42 U.S.C. § 7475. That mandate for PSD permits to address GHGs, meanwhile, is the product of the *Clean Air Act itself*, and was separately affirmed in *CRR*. *See* 684 F.3d at 136, 144. Thus, Texas's ability to issue valid PSD permits would not be restored by vacatur of the Error Correction Rules.

Industry Petitioners allege that the Error Correction Rules "impose[] on them binding requirements regarding permitting and regulation of GHGs under the PSD program" and "call[] into question" the validity of a permit issued by Texas to one Petitioner, Chase Power Development LLC ("Chase"), while the Interim Rule was in effect. Like Texas, the Industry Petitioners are subjected to "binding requirements" not by the Error Correction Rules, but by the CAA's own PSD provisions. *See CRR*, 684 F.3d at 144. Indeed, vacatur of the Error Correction Rules (or at least the Final Rule that is still in effect) would only worsen Petitioners' situation, since GHG-emitting sources in Texas would then be unable to obtain valid PSD permits from anyone. Similarly, the validity of the PSD

permit that Texas issued to Chase while the Interim Rule was in effect is determined by its compliance with the statutory PSD requirements, regardless of whether the Interim Rule survives judicial review.

These circumstances closely parallel those facing this Court in *CRR*. The petitioners in *CRR* challenged the Timing and Tailoring Rules, complaining that they were injured by being subject to regulation of GHGs because of those rules. 684 F.3d at 146. As the Court explained, the regulatory burdens to which the petitioners objected were caused "by automatic operation of [the PSD provisions of] the statute. Given this, neither the Timing nor Tailoring Rules caused the injury Petitioners allege: having to comply with PSD and Title V for greenhouse gases." *Id.* These Petitioners have also failed to proffer allegations sufficient to show that they suffer any actual injury that was caused by, and can be relieved through vacatur of, the Error Correction Rules. Therefore, like the petitioners in *CRR*, their suit should be dismissed for lack of standing.

II. The Challenge to the Interim Rule Is Moot.

Even if Petitioners have standing, the challenge to the Interim Rule should still be dismissed as moot, so that the Court may avoid issuing an advisory opinion on the issue of whether EPA validly relied on the APA "good cause" exception to promulgate the rule without public notice and comment.

A matter becomes moot and must be dismissed "if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) (citation omitted). Here, the Interim Rule expired by its own terms on April 30, 2011, and no longer has any continuing effect since EPA never issued any permits under the Interim FIP. *See* 75 Fed. Reg. at 82,458; *see also Northwest Pipeline Corp. v. FERC*, 863 F.2d 73, 75-77 (D.C. Cir. 1988) (challenge to rescinded rate certificates is moot).

Petitioners note that Texas issued a PSD permit for a GHG-emitting facility owned by Chase on April 18, 2011, while the Interim Rule was in effect. *See* Pet'rs' Br. at 18, 51. They assert that the Interim Rule "disapproved [Texas's] role as the sole permitting authority, and hence" there is a continuing controversy regarding "whether [Texas] could issue a complete PSD permit [to Chase] under its PSD SIP." *Id.* at 51. However, Chase's PSD permit – which does not address GHGs – is invalid because it does not meet the requirements of the CAA itself as set forth in 42 U.S.C. § 7475(a), not just the State's approved SIP. *See supra* at

26-27. The PSD requirements relating to GHGs apply "by automatic operation of the statute,"[5] *CRR*, 684 F.3d at 146, not because of the Interim Rule.

The Interim Rule litigation is also moot because EPA repromulgated the Error Correction Rule pursuant to notice-and-comment procedures, superseding the Interim Rule. EPA has therefore granted Petitioners the procedural relief they seek – notice and an opportunity to comment – and the substance of the Error Correction Rule will be subject to review in the Final Rule litigation. In 1982, this Court was confronted with similar circumstances and concluded that "repromulgation of the rule after providing notice and opportunity for comment" rendered the challenge to the interim rule a moot request for an "advisory opinion." *NRDC v. Nuclear Regulatory Comm'n*, 680 F.2d 810, 813-14 & n.8 (D.C. Cir. 1982). By contrast, the cases to the contrary cited by Petitioners mainly concern situations where the substance of the interim rule could not be fully challenged through litigation regarding the final, notice-and-comment version of the rule. *See*

[5] Because *CRR* decided as a matter of law that the CAA itself requires that "any 'major emitting facility' covered by the PSD program must install BACT for greenhouse gases," 684 F.3d at 133, Petitioners are incorrect in contending that the validity of individual PSD permits must be tested through separate "administrative proceedings" or a "suit to enjoin construction . . . in the district court." Pet'rs' Br. at 53. Nonetheless, if Chase or any other permit holder believes that its permit is valid despite its inconsistency with the requirements of 42 U.S.C. § 7475, it may pursue such a defense in such a proceeding. Furthermore, similar arguments regarding the validity of a PSD permit issued under an existing SIP that does not meet the CAA's statutory requirements have also been raised and fully briefed in the pending challenge to the GHG SIP Call. *See supra* at 20.

NRDC v. EPA, 683 F.2d 752, 754-56, 767-68 (3rd Cir. 1982) (opportunity to comment related only to whether postponement of the effective date of regulatory amendments should be continued, not the initial postponement itself); *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 711 F.2d 370, 377-79 (D.C. Cir. 1983) (agency had not offered any opportunity to comment on part of the interim rule); *NRDC v. Abraham*, 355 F.3d 179, 206 n.14 (2d Cir. 2004) (subsequent proceedings "addressed questions wholly different from those that would have been addressed" through comments on the interim rule). *American Maritime Ass'n v. United States*, meanwhile, involved a unique situation where the challenge regarding the interim rule was part of an ongoing matter that had already been in litigation, and the subject of prior court opinions, over the past three years. 766 F.2d 545, 547-48 (D.C. Cir. 1985).

The mootness exception for actions that are "capable of repetition, yet evading review" does not apply here. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). The Interim Rule was of short enough duration to potentially evade review. However, Petitioners have provided no reasonable basis for an expectation that the unusual factors that led EPA to issue an interim rule here – Texas's last-minute notice of its refusal to revise its PSD SIP, the then-unlitigated question of whether the State had an obligation to update its SIP in order to

adequately implement the CAA's requirements, and the prospect that the resulting gap in permitting authority would in the short term prevent a number of sources from obtaining valid PSD permits – will recur. Petitioners' insistence that they reasonably expect Texas to face this situation again because the State cannot promulgate an automatically updating SIP, Pet'rs' Br. at 55, is also unavailing given EPA's explanation of the several mechanisms *besides* an automatically updating SIP that would be sufficient to meet the CAA's PSD requirements. *See* 76 Fed. Reg. at 25,194/3. Therefore, even if the Court goes on to review the Final Rule, the challenge to the Interim Rule should be dismissed as moot.

III. The Clean Air Act's Authorization for EPA to Revise a SIP Approval that "Was in Error" Unambiguously Encompasses Any Error, Not Only Technical or Clerical Errors

EPA correctly interpreted 42 U.S.C § 7410(k)(6) to encompass the type of error at issue in this case, looking to the provision's plain language and the surrounding context of the CAA. Petitioners' cramped reading of section 7410(k)(6), on the other hand, lacks any sound basis in the CAA's actual text. EPA's interpretation should be upheld under *Chevron* step one.

A. The Plain Meaning of Section 7410(k)(6) Does Not Limit EPA to Correcting Only Certain Types of Errors.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses

the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). The plain language of section 7410(k)(6) is broad; "whenever the [EPA] Administrator determines" that an EPA "action" on a SIP submission, including a SIP approval, "was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State." 42 U.S.C. § 7410(k)(6).

1. The Phrase "Was in Error" Allows EPA to Revise a SIP Approval or Disapproval that Was Mistaken in Light of the CAA Requirements Applicable at the Time of EPA's Action.

The heart of 42 U.S.C. § 7410(k)(6) is the authorization for EPA to correct an action on a SIP submission that the Agency determines "was in error." This phrase is not further defined in the Act, and should therefore be given its ordinary meaning. *See Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010). The ordinary meaning of "was in error" provides no reason to think, as Petitioners suggest, that section 7410(k)(6) should be read as authorizing action regarding only "clerical" or "technical" errors. Pet'rs' Br. at 30.

"Error" is defined as "(1) an act, assertion, or belief that unintentionally deviates from what is correct, right or true; (2) the state of having false knowledge . . . (4) a mistake . . . ." Webster's II New Riverside University Dictionary 442 (1988) (quoted in 75 Fed. Reg. at 82,452/1-2); *see also* Black's Law Dictionary

(9th ed. 2009) ("error" means "[a]n assertion or belief that does not conform to objective reality; a belief that what is false is true or that what is true is false," or "mistake"). Defying the broad scope of this definition, Petitioners assert that section 7410(k)(6) allows for correction of only "technical," "clerical," or "minor" errors. *See* Pet'rs' Br. at 31, 33, 37, 38. Yet they offer no alternative definition of "error" that would impose such restrictions.[6]

Where Congress has intended to specify a particular type of error, in both the CAA and other statutes, it has expressly modified the term "error" to do so, including in the context of error correction. *See* 42 U.S.C. § 7607(d)(8) ("procedural errors"); 42 U.S.C. § 7651a(4)(C) ("factual errors"); 16 U.S.C. § 410r-9(b)(2) (correction of "technical and clerical errors"); 17 U.S.C. § 803(c)(4) (correction of "technical or clerical errors"); 19 U.S.C. § 1671d(e) (correction of "ministerial errors"); 43 U.S.C. § 1165 (correction of "clerical error"). Since Congress included no such qualifiers here, "error" should be read to include all incorrect EPA actions on a SIP submission, without regard to the nature of the

[6] Notably, Petitioners never even define a "technical" error. The most applicable dictionary definition appears to be "of or relating to technique," with "technique" meaning "a method of accomplishing a desired aim." Merriam-Webster Dictionary, http://www.merriam-webster.com (last visited July 24, 2012). Such a definition could in fact be broad enough to encompass the error at issue here: a failure to include a "method" (*e.g.*, a procedural mechanism) sufficient to "accomplish[]" the "desired aim" of applying PSD to all pollutants regulated under the CAA.

mistake. Indeed, Congress has used the phrases "was in error" and "in error" in federal statutes to allow agencies to correct errors – including substantive errors – in determinations on drug applications and Social Security benefits. *See* 21 U.S.C. § 335a(f)(2)(A) (temporary denials of generic drug applications based on findings of significant questions of integrity are terminated "if the Secretary [of HHS] determines that such finding was in error"); 42 U.S.C. § 423(f)(4) (termination of Social Security benefits may be based on a finding of "substantial evidence . . . which demonstrates that a prior determination was in error"); 42 U.S.C. § 1382c(a)(4)(C) (similar).

Petitioners theorize that adopting the ordinary meaning of "error" here would create an "unlimited revisory power" and enable the Agency to make "unilateral change[s] in a SIP whenever EPA changed policy." Pet'rs' Br. at 20, 36. However, EPA has recognized limiting principles in the language of section 7410(k)(6) and has abided by those principles here. *See, e.g.*, 76 Fed. Reg. at 25,194/3-95/1, 25,199/1. Foremost, EPA must determine that its action on a SIP submission "was" in error. The use of the past tense constrains EPA to examine whether its SIP approval or disapproval was erroneous in light of the CAA requirements that would have been applicable to the SIP *at the time*, as opposed to

a wholly new CAA requirement. EPA Response to Comments ("RTC") at 26-27, JA342-43.

Furthermore, EPA's power to revise is limited to altering its own "action" in approving or disapproving a SIP. In keeping with the cooperative federalism structure of the CAA, EPA may not unilaterally rewrite the actual text of a SIP, which consists of state law. Thus, where a section 7410(k)(6) rulemaking results in a disapproval of some portion of a SIP, if the State chooses to revise its SIP in order to regain approval, it retains its role in determining how to meet the CAA's requirements. RTC at 25-26, JA341-42.

Other than these limitations – which are based in the plain text of section 7410(k)(6) – the provision simply means what it says: EPA may correct its own actions where those actions were undertaken in error. Certainly section 7410(k)(6) is broad enough to encompass the type of error at issue here, EPA's erroneous approval of a SIP that was flawed because it failed to address a CAA requirement.

2. The Language of Section 7410(k)(6) as a Whole Confirms that EPA May Revise a SIP Approval that It Determines Was Erroneous.

Given the lack of any textual restrictions on the scope of the term "error," Petitioners attempt to import limitations from the rest of section 7410(k)(6). These attempts are unavailing.

a. Section 7410(k)(6) Gives EPA Discretion to Determine What Constitutes an Error and When It Requires Correction.

Section 7410(k)(6) contains several terms indicating that EPA has broad discretion to act under this provision, whether it confronts an error that is minor or fundamental.

First, Congress did not include any explicit criteria constraining EPA's authority in "determin[ing]" what might constitute an error in an action approving or disapproving a SIP. *Compare* 42 U.S.C. § 7410(k)(6) *with* 19 U.S.C. § 1671d(e) (expressly defining which errors in customs duty determinations are correctable). Congress also delegated to EPA the judgment as to whether action under section 7410(k)(6) "may" be "appropriate," language providing EPA with significant discretion to decide whether to act. *See* 76 Fed. Reg. 25,199/3; 75 Fed. Reg. 82,453/1; *see also, e.g.*, *Horne v. Flores*, 557 U.S. 433, 440 (2009) (recognizing that such language vests discretion in agency); *Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 189 (D.C. Cir. 1983) (similar). Even if such phrasing is meant to "'keep EPA within bounds,'" Pet'rs' Br. at 39 (quoting *Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997)), as long as EPA is within those bounds – *i.e.*, it has articulated a reasoned basis for its judgment that an error correction under section 7410(k)(6) is "appropriate" – this Court should defer to the Agency's

judgment. *See, e.g.*, *Illinois v. Interstate Commerce Comm'n*, 713 F.2d 305, 310 (7th Cir. 1983).

Congress also left to EPA the decision as to *when* to take action, authorizing the Agency to undertake an error correction "whenever" it determines a prior SIP approval or disapproval was in error. 42 U.S.C. § 7410(k)(6). "Whenever" means "[a]t any time when; every time that, as often as." Oxford English Dictionary (2d ed. 1989). EPA may therefore act under section 7410(k)(6), if it deems such action "appropriate," even if its original action was long ago. *See* 76 Fed. Reg. at 25,181/1; *see also Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (noting that the word "'whenever' . . . impl[ies] a degree of discretion"); *Affinity Healthcare Servs., Inc. v. Sebelius*, 746 F. Supp. 2d 106 (D.D.C. 2010) (word "whenever" in a judicial review provision indicates that review is available at "any time"). Accordingly, EPA has used section 7410(k)(6) to correct even errors which came to light long after the initial action. *See, e.g.*, 61 Fed. Reg. 47,058 (Sept. 6, 1996) (disapproving provisions erroneously incorporated into Wyoming SIP in the 1970s). As the subject matter of this litigation itself illustrates, an error may lurk in an EPA SIP approval or disapproval long after the Agency originally acted, and it would compromise EPA's ability to ensure a SIP correctly implements the "applicable requirements" of the CAA if a

court were to arbitrarily limit EPA's ability to correct such errors based solely on how much time had passed since the original decision. *See* 42 U.S.C. § 7410(k)(3).

b. EPA Has Broad Authority to "Revise" Its Action Regarding a SIP Submission, Including the Power to Change an Approval to a Disapproval.

Like the term "error," "revise" is not defined in section 7410(k)(6), and should thus be assigned its ordinary meaning: to "change" or "modify." Webster's II New Riverside University Dictionary 1006 (1988); RTC at 29, JA345. On its face, this definition includes changing a SIP approval to a disapproval, as EPA did here for part of Texas's SIP.

Petitioners offer a different definition of "revise": to "go or read over to correct errors or make improvements." Pet'rs' Br. at 38 (quoting Webster's Third New International Dictionary 1944 (1971)). This definition in fact *supports* EPA's authority to "correct errors" in its action on a SIP submission, which might include changing an erroneous approval to a disapproval. Petitioners' suggestion that EPA should instead change the content of a SIP itself in order to correct an error, *see* Pet'rs' Br. at 38, contravenes section 7410(k)(6)'s direction for EPA to revise its own earlier "*action*," not to make edits to the *text* of the SIP submissions provided by the States. 42 U.S.C. § 7410(k)(6) (emphasis added).

c. Revising a SIP Approval to Be a Disapproval "In the Same Manner" as the Original Action Only Requires EPA to Apply the Same Rulemaking Procedures.

Section 7410(k)(6) provides that if EPA revises a SIP approval or disapproval, it must do so "in the same manner as" the original action. 42 U.S.C. § 7410(k)(6). Petitioners assert that this language prevents EPA from applying new criteria to past SIP approvals, Pet'rs' Br. at 36-37, but as discussed *infra* at 53-57, EPA did not try to do so here. In any event, EPA has not interpreted this phrase as imposing substantive constraints. Rather, the Agency construes "in the same manner" as requiring revision of its erroneous action using the APA or CAA *procedures* applicable to the original rulemaking. 76 Fed. Reg. at 25,199/2-3. This reading relies on the ordinary meaning of the phrase – to ensure that any EPA action under section 7410(k)(6) undergoes a "proper rulemaking process," 75 Fed. Reg. at 82,459/1 – as well as its linkage to the procedurally oriented phrase "without requiring any further submission from the State," RTC at 38, JA354, and should be upheld by the Court.[7]

The Supreme Court itself recently construed the phrase "in the same manner" to relate only to procedural, not substantive, requirements. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583-84 (2012) (statutory

[7] EPA offered this interpretation under either *Chevron* step one or *Chevron* step two. 76 Fed. Reg. at 25,199/2.

command that a penalty be "assessed and collected in the same manner" as taxes directs "the Secretary of the Treasury to use the same methodology and procedures to collect the penalty that he uses to collect taxes"). In citing ostensibly contrary cases, Petitioners fail to mention that the statutes at issue in those cases contained other language expressly indicating that Congress meant to refer to substantive requirements. *See United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702, 714 (7th Cir. 1998) (state law provision creating liability "'in the same manner *and to the same extent*' as liability under" a federal statute (emphasis added)); *United States v. Twp. of Brighton*, 153 F.3d 307, 324 (6th Cir. 1998) (governmental entities subject "'to the provisions of [a federal statute] in the same manner *and to the same extent, both procedurally and substantively*, as any nongovernmental entity'" (emphasis added)).

EPA also is not bound by this phrase to make its error correction determination on the same record that was before it at the time of the initial action, as Petitioners argue. Pet'rs' Br. at 37. The Agency must conduct the *revision* of its action "in the same manner" as the original action; but that same restriction does not apply to the separate, threshold task of reaching a *determination* as to whether the action "was in error." 42 U.S.C. § 7410(k)(6). Otherwise EPA would,

absurdly, be precluded from relying on later-discovered information that exposes an initial error.

Petitioners' assertion that the requirement to act "in the same manner" as the original action means that "[a]ny EPA action to correct an 'approval' must result in a corrected 'approval,' not in a 'disapproval,'" Pet'rs' Br. at 37, is even more farfetched. Such an approach would bind EPA to a decision that the Agency has since determined was erroneous, possibly requiring EPA to knowingly re-approve a SIP provision that does not meet the requirements of the CAA, in violation of 42 U.S.C. § 7410(*l*).

3. EPA's Interpretation of Section 7410(k)(6) Is Consistent with the Overall Structure of Section 7410.

Petitioners rely most heavily on "the structure of CAA § 7410" as narrowing the scope of section 7410(k)(6), Pet'rs' Br. at 32, but in fact EPA's reading of that provision to provide a broad error correction authority is consistent with the procedures set out in section 7410.

a. Sections 7410(c) and (k)

As outlined *supra* at 5-6, the basic mechanism for putting a SIP in place is for a State to propose a SIP (or SIP revision), and provide notice and opportunity for public hearings on the proposal; for EPA to review it under section 7410(k) to determine whether it meets the CAA's requirements; and for EPA to approve or

disapprove the SIP in whole or in part. EPA's construction of section 7410(k)(6) is not "fundamentally inconsistent with [that] basic structure." Pet'rs' Br. at 31.

Petitioners' main complaint is that EPA's error correction action in this case circumvents the state-level notice and hearing process. *See* Pet'rs' Br. at 32. But section 7410(k)(6) clearly applies, as here, only where *that process has already taken place* with respect to the State's original submission. Section 7410(k)(6) simply allows EPA to re-conduct its review of that submission under section 7410(k)(3) where the Agency's original action under that provision was erroneous. That is why section 7410(k)(6) specifically provides that, when EPA undertakes an error correction, it need not "requir[e] any further submission from the State"; such a re-submission would merely be duplicative of procedures that have already been correctly observed.

Where, as here, the result of the error correction process is to revise a SIP approval to be a disapproval, EPA must then issue a FIP under 42 U.S.C. § 7410(c)(1). However, the State may at any time after the disapproval submit another SIP revision to cure the flaw in its original SIP submission, just like any State with a disapproved SIP. Thus, States do retain their role in formulating strategies to achieve the CAA's requirements. *See Union Elec. Co. v. EPA*, 427 U.S. at 256.

Finally, Petitioners attempt to subject this error correction process to the same time limitations constraining EPA's initial review of a SIP revision in 42 U.S.C. § 7410(k)(1)(B) and (k)(2). Pet'rs' Br. at 32. However, Congress's decision to separately authorize EPA to correct a SIP action "whenever" the Agency may determine it was in error makes clear that these time limits are inapplicable to section 7410(k)(6). *See supra* at 37-38. This approach does not undermine the time limitations on EPA's initial SIP review, since EPA still must reach a "binding decision" on a SIP submission within the specified time period, Pet'rs' Br. at 32; section 7410(k)(6) simply provides a statutory mechanism for correcting any errors that EPA may make in doing so.

b. Section 7410(k)(5)

Petitioners argue that their narrow interpretation of section 7410(k)(6) is necessary to avoid rendering the SIP call provision, 42 U.S.C. § 7410(k)(5), superfluous. Pet'rs' Br. at 34. Since that issue is the subject of separate, pending litigation between EPA and some of these Petitioners, *supra* at 20, it should not be resolved here. *Cf. CRR*, 684 F.3d at 148-49 (declining to reach issues raised in other GHG-related litigation). However, at the least it is clear that EPA's reading of section 7410(k)(5) and 7410(k)(6) is internally consistent.

Section 7410(k)(5) authorizes EPA to call for the revision of a SIP "[w]henever" the Agency "finds that the applicable implementation plan . . . is substantially inadequate to . . . comply with any requirement of [the CAA]." 42 U.S.C. § 7410(k)(5). EPA recognizes that this provision could overlap with section 7410(k)(6) in some situations, *see* 76 Fed. Reg. at 25,203/1, but the two subsections differ in important ways. Section 7410(k)(6) is focused on whether a SIP meets the requirements that were in effect at the time EPA acted on the SIP, while section 7410(k)(5) allows EPA to issue a SIP call based on a SIP's failure to meet even new requirements. *Compare* 42 U.S.C. § 7410(k)(6) ("*was* in error") with *id.* § 7410(k)(5) ("*is* substantially inadequate"). Additionally, section 7410(k)(5) concerns the revision of the substance of a SIP through *state* action, while section 7410(k)(6) concerns the correction of *federal* approvals or disapprovals of those plans. *See* 76 Fed. Reg. at 25,203/2.

Thus, EPA's interpretation of section 7410(k)(6) does not render section 7410(k)(5) superfluous. For example, EPA could not act under section 7410(k)(6) where a SIP fails to meet a new CAA requirement, or where the problem at hand can be fixed only through revision of the substance of a SIP. Nor does EPA's reading of section 7410(k)(6) contradict the procedural requirements set out in section 7410(k)(5); the latter are merited where a State formulates a new SIP

revision in response to a finding of substantial inadequacy, whereas such procedures would be unnecessary in an error correction rulemaking aimed at reevaluating *EPA's* action on an already-submitted SIP that has previously been through notice and hearings.

c. Section 7410(*l*)

Section 7410(*l*) prohibits EPA from approving a SIP revision that "would interfere with . . . any [] applicable requirement of [the CAA]." 42 U.S.C. § 7410(*l*). Petitioners fail to account for this provision, which supports EPA's reading of section 7410(k)(6) as authorizing the Agency to correct a mistaken approval of a SIP that does not meet the CAA's requirements by converting the approval to a disapproval; otherwise the approval would contravene section 7410(*l*)'s express prohibition.

In sum, EPA's interpretation of section 7410(k)(6) has a firm basis in the unambiguous statutory text and is consistent with the overall structure of section 7410. There is no reason for the Court to look any further in considering its meaning.

B. EPA's Construction of Section 7410(k)(6) Is Reasonable.

Even if the Court finds that section 7410(k)(6) is silent or ambiguous as to the scope of EPA's error correction authority, EPA's interpretation merits the

Court's deference under *Chevron* step two. *See* 467 U.S. at 842-44. As detailed *supra* at 31-45, EPA's reading of section 7410(k)(6) is faithful to the text of section 7410(k)(6) as a whole and reasonable in light of the CAA's structure and purposes.[8] *See* 76 Fed. Reg. at 25,198/2-3; 75 Fed. Reg. at 82,452/1-2.

Petitioners assert that this Court should rely on a handful of sources to narrow the broad scope of section 7410(k)(6)'s plain meaning: a Third Circuit case decided three years before section 7410(k)(6) was enacted and never mentioned in its legislative history, *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777 (3rd Cir. 1987); an obscure phrase in the legislative history; and a post-enactment statement of a single legislator. None of these sources supports their arguments.

Bridesburg concerned an EPA rule that rescinded approval of odor regulations in the Pennsylvania SIP on the basis that the Agency lacked authority to approve such regulations as part of a SIP because they were not related to the implementation of any applicable CAA requirement. 836 F.2d at 779. Characterizing EPA's actions as directly deleting the odor regulations from the Pennsylvania SIP rather than as a revision of EPA's own SIP approval, *id.* at 784-

[8] EPA has consistently applied section 7410(k)(6) in prior rulemakings to encompass substantive, non-minor errors, and therefore its interpretation should be accorded "particular deference." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 235 (2009). EPA has previously utilized section 7410(k)(6) to address substantive errors in both area designations (the other subject of this subprovision) and SIP actions. *See, e.g.*, 61 Fed. Reg. 14,496 (Apr. 2, 1996); 71 Fed. Reg. 75,690 (Dec. 18, 2006).

85, the Third Circuit ruled in favor of the rule's challengers, holding that EPA could not take such action without notice to the State and a public hearing pursuant to section 7410's requirements for a SIP revision. *Id.* at 779-80. The court also suggested that EPA had inherent authority to correct "typographical errors," but nothing more. *Id.* at 786. *Bridesburg* concluded that EPA's action thus lay outside EPA's inherent authority to reconsider its initial approval of the odor regulations, both because the reconsideration occurred years later, outside of a "reasonable" time window and after a number of reapprovals of the relevant provisions, and because EPA's decision was based on a "clear change in policy" since the time of the approval rather than a belated "correction" of an "inadvertent mistake." *Id.* at 785-86.

Bridesburg's reading of the CAA has been unequivocally superseded by the enactment of section 7410(k)(6) in 1990. The legislative history of the 1990 CAA Amendments contains not a single reference to the *Bridesburg* decision, leaving the Petitioners with no foundation for their contention that Congress intended to codify its conclusion that EPA has inherent authority to correct only typographical errors. *See* Pet'rs' Br. at 29. Nor does the text of section 7410(k)(6) reflect the language of *Bridesburg*: section 7410(k)(6) relates to "error[s]," not just "typographical errors"; it applies "whenever" EPA makes the requisite error

determination, not only within a "reasonable" time window after the original approval; and it frames an error correction as a "revision" of EPA's own approval or disapproval "action," rather than a direct revision of a SIP, echoing EPA's position in *Bridesburg* that the reconsideration of its own SIP actions should not be subject to the same procedural requirements as a direct SIP revision.

This differing language belies Petitioners' contention that, by stating that section 7410(k)(6) "explicitly authorizes" EPA to correct errors in SIP actions, the House committee report on the 1990 CAA Amendments shows Congress intended merely to codify a limited inherent error correction authority. Pet'rs' Br. at 29-30 (citing H.R. Rep. No. 101-490, Pt. 1, at 220 (1990), JA774). To the contrary, the House report "explicitly authorizes EPA on its own motion . . . to correct any errors it may make in taking any action [on a SIP]," with no reference to the sort of limitations on EPA's authority described in *Bridesburg*. *Id.* Indeed, *Bridesburg* relied in part on the fact that the CAA did *not* provide any explicit authorization for EPA's action "other than through the [SIP] revision provisions," 836 F.2d at 785, suggesting that Congress's statement that it was "explicitly authoriz[ing]" error correction actions was meant to highlight that section 7410(k)(6) creates an authority not recognized in *Bridesburg*. In fact, it was the Bush Administration that proposed section 7410(k)(6), and EPA that originally described section

7410(k)(6) in the same words as the House report – as "explicitly authoriz[ing] EPA" to correct "any errors" in SIP approvals or disapprovals – in its analysis of that proposal. EPA, CAA Amendments of 1989 Section-by-Section Analysis 7 (1989), JA791; *see also* 135 Cong. Rec. 16,552-58 (July 27, 1989) (introducing Bush Administration proposal as H.R. 3030), JA759-65; H.R. 3030, 101st Cong. § 101(e)(5) (1989), JA740; 135 Cong. Rec. 18,245-48 (Aug. 3, 1989), JA767-70 (submitting EPA analysis of bill into record). EPA was clearly aware of *Bridesburg*, and its description of section 7410(k)(6) as giving it the explicit authority that *Bridesburg* found lacking, indicates, if anything, that section 7410(k)(6) was drafted by the Bush Administration to override *Bridesburg*.[9] *See* 76 Fed. Reg. at 25,180/3.

To the extent the legislative history says anything relevant, it *confirms* EPA's reading of section 7410(k)(6) as a broad error correction authority. The same House report cited by Petitioners states that EPA may use section 7410(k)(6) to correct "*any* errors" in "*any* action" on a SIP. H.R. Rep. No. 101-490, Pt. 1, at 220 (1990), JA774 (emphases added). As used in the CAA, "the word any has an expansive meaning, that is, one or some indiscriminately of whatever kind." *CRR*, 684 F.3d at 134 (internal quotation marks and citations omitted).

[9] EPA has, since *Bridesburg*, employed its section 7410(k)(6) error correction authority to remove odor regulations from SIPs. *See, e.g.*, 64 Fed. Reg. 7790 (Feb. 17, 1999).

Finally, Petitioners cite a single source for their proposition that the term "error" in section 7410(k)(6) is in fact limited to "technical" or "clerical" errors: a law review article authored by Representative Henry Waxman in 1991. *See* Pet'rs' Br. at 30. The article described the scope of the section 7410(k)(6) error correction authority more narrowly than either the House report or the language of the provision itself, as having been "included to enable EPA to deal promptly with clerical errors or technical errors," rather than as "a route for EPA to reevaluate its policy judgments." Hon. Henry A. Waxman *et al.*, *Roadmap to Title I of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 1843, 1924-25 (1991).

In relying on this statement, Petitioners ignore the established principle that "the postenactment pronouncements of individual legislators purporting to construe an earlier statute have little, if any, weight in the judicial construction of the statute."[10] *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 232 (1981); *see also Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 763 n.112 (D.C. Cir. 1988). Representative Waxman may have had a narrow view of the purpose of section

[10] The cases that Petitioners cite as demonstrating that "this Court has cited Representative Waxman's analysis of the legislation when it has interpreted provisions enacted or revised in the 1990 Amendments" do not show that this Court has relied on his unilateral comments as a tool of statutory interpretation. Pet'rs' Br. at 30 n.10. Rather, they simply refer to his article for uncontroversial background information. *See S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 886 (D.C. Cir. 2006); *NRDC v. Reilly*, 983 F.2d 259, 271-72 & n.22 (D.C. Cir. 1993).

7410(k)(6), but that does not mean other legislators did not have a broader conception motivating their choice of broad statutory language not limited to technical or clerical errors. And even if his personal review did reflect Congress's view of the "particular evil" it sought to remedy by enacting section 7410(k)(6), the scope of that provision should not be confined to accomplishing that aim alone. *Brogan v. United States*, 522 U.S. 398, 403 (1998) (declining "to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy"); *see also Massachusetts v. EPA*, 549 U.S. at 532 (recognizing that "broad language" of a CAA provision was meant to provide "regulatory flexibility" to EPA even if the Act might thereby be applied in situations not expressly contemplated by Congress).

Moreover, EPA has *not* sought to rely on section 7410(k)(6) as "a route for EPA to reevaluate its policy judgments," the one use of the provision that Representative Waxman expressly cautioned against. Rather, the Agency reevaluates a SIP action in light of the same CAA requirements that applied at the time it was originally decided. EPA was clear about this approach in the Error Correction Rules, identifying the relevant error as approval of a SIP that was flawed in light of the PSD requirements applicable *at the time of the original approval*. *See, e.g.*, 76 Fed. Reg. at 25,203/2; 75 Fed. Reg. at 82,433/1.

This reasonable construction of section 7410(k)(6) has provided EPA with a valuable tool in administering the CAA. It allows EPA to provide assistance where state legislative or administrative action would be impractical or would not solve EPA's mistake. For example, if a state law provision is erroneously incorporated in an approved SIP, the State may request that EPA revise its action and disapprove that portion of the SIP to remove federal enforceability, while keeping the state law in place and avoiding the process of resubmitting the SIP. *See, e.g.*, 73 Fed. Reg. 21,546 (Apr. 22, 2008) (correcting erroneous approval of New York SIP to disapprove odor regulations that were not relevant to attainment of CAA requirements). It also permits correction of mistakes that fall outside Petitioners' understanding of "technical" or "clerical" errors, but for which a full resubmission by the State is unnecessary. *See, e.g.*, 74 Fed. Reg. 3975 (Jan. 22, 2009) (correcting approval of SIP provisions applying requirements to federal government beyond the scope of the sovereign immunity waiver in 42 U.S.C. § 7418(a)). In fact, several EPA error correction rules have involved revising a SIP approval or disapproval at a State's own request. *See, e.g.*, 64 Fed. Reg. 7790 (Feb. 17, 1999); 61 Fed. Reg. 47,058 (Sept. 6, 1996). These examples highlight the reasonableness of a broad error correction authority as enacted in section 7410(k)(6).

IV. EPA's Determination that Its Approval of the Texas PSD SIP "Was in Error" Was Not Arbitrary or Capricious.

EPA's determination that it approved the Texas PSD SIP in error should survive judicial review under the arbitrary-or-capricious standard. EPA has articulated reasonable grounds for its error determination: that, because PSD unambiguously and automatically applies to all pollutants regulated under the CAA, EPA acted erroneously when it approved Texas's PSD SIP even though the SIP did not address that requirement, such as by providing a mechanism for ensuring that the State's PSD program could later be revised to cover any newly regulated pollutants.[11]

Petitioners contest the reasonableness of EPA's determination, asserting that "the submittal met all requirements of the Act," and that EPA's determination in fact rested on "a shift in the Agency's policy judgment." Pet'rs' Br. at 20. Those assertions cannot stand in the face of this Court's recognition in *CRR* that the mandate that PSD apply to major sources of any pollutant subject to regulation under the CAA, including any newly regulated pollutant, has existed for more than

[11] In the preambles to the Interim and Final Rules, EPA asserted as an alternative basis for its action that it had inherent authority to reconsider its decision approving the Texas PSD SIP. However, the Court need not reach that issue because these rules were within EPA's authority under section 7410(k)(6). If the Court does do so, it should affirm EPA's inherent authority to correct mistakes in its own actions as explained in the Error Correction Rules. *See* 76 Fed. Reg. at 25,200-02; 75 Fed. Reg. at 82,436.

30 years. *See* 684 F.3d at 114, 129; *see also* 40 C.F.R. § 51.166(b)(1) (1992); 76 Fed. Reg. at 25,182/1-2; 75 Fed. Reg. at 82,437/1. EPA clearly identified the CAA and regulatory provisions outlining that mandate as the basis for its error correction determination. *See* 76 Fed. Reg. at 25,183/3, 25,198/1, 26,194/3. EPA's interpretation of its own regulation governing the required contents of SIPs, 40 C.F.R. § 51.166, is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks and citations omitted).

The law was likewise clear when EPA approved Texas's PSD SIP in 1992: the State's PSD program would need to address any pollutants that became subject to regulation. *See* 76 Fed. Reg. at 25,183 n.11. Texas even updated its PSD rule during the SIP approval process itself to include particulate matter when that pollutant became subject to CAA regulation. *Id.* at 25,184/2; *see also* 54 Fed. Reg. at 52,823. And although the regulation of GHGs was not expressly discussed at the time, GHGs fit well within the broad scope of the term "air pollutant." *CRR*, 684 F.3d at 135 ("Congress made perfectly clear [through the language of the CAA] that the PSD program was meant to protect against precisely the types of harms caused by greenhouse gases."). Therefore, contrary to Petitioners' assertions, the application of PSD to GHGs is neither a new requirement nor a

"fundamentally different" extension of requirements that existed as of 1992. Pet'rs' Br. at 23.

Petitioners' argument that EPA's action represents the imposition of a new requirement for PSD SIPs to automatically update to include newly regulated pollutants, outside the normal SIP revision process, is a straw man. *See* Pet'rs' Br. at 22-24. EPA made clear in the Error Correction Rules that, although a PSD SIP could be updated automatically, Texas could also have met the requirement to apply PSD to newly regulated pollutants by providing assurances that the State would undertake the necessary updating along with details "as to the method and timing for applying PSD to such pollutants" – including "through a separate SIP revision, which would apply PSD specifically with respect to that [newly regulated] pollutant."[12] 76 Fed. Reg. at 25,194/3. In fact, Texas included such a provision in its PSD SIP in 1992 with respect to a different CAA requirement, providing for annual review of the SIP and revision as necessary to ensure compliance with applicable pollution increments set under 42 U.S.C. § 7473. *See* 76 Fed. Reg. at 25,185/2-3.

[12] Neither a SIP revision nor automatic updating would pose any conflict with CAA subsections 7410(a)(2) or 7410(*l*), 42 U.S.C. §§ 7410(a)(2), (*l*). *See* Pet'rs' Br. at 24-25. In the former case, the SIP revision would comply with the procedures required under those provisions. Where a State has chosen to include an automatically updating provision in its PSD SIP to incorporate all regulated pollutants by reference, such a provision would itself have been added to the SIP through the normal notice-and-hearing process.

Based on its assessment of the requirements applicable to Texas's PSD SIP at the time it was approved, EPA's error determination was straightforward: "[t]he gaps in Texas's PSD SIP – its failure to address, or provide assurances of the requisite legal authority concerning, the application of PSD to all pollutants newly subject to regulation, including non-NAAQS pollutants – means that the PSD SIP was flawed at the time that EPA reviewed it for action," and therefore EPA's approval of the SIP was in error. 75 Fed. Reg. at 82,433/1; *see also* 76 Fed. Reg. at 25,194/2. Texas's recent refusal to apply PSD to GHGs has made that gap "particularly evident" and illustrated that Texas's purported *ability* to update its SIP to address newly regulated non-NAAQS pollutants, Pet'rs' Br. at 44, is still not sufficient to meet the statutory *requirement* to do so. 76 Fed. Reg. at 25,179/1. This problem exists regardless of whether Texas has previously voluntarily updated its SIP to apply to newly regulated pollutants. *See* Pet'rs' Br. at 43-44, 46.

Even if the Court concludes that Texas's PSD SIP was sufficient merely because it allows for updating to address newly regulated pollutants, the SIP was still flawed – and EPA's approval of that SIP still in error – because Texas did not provide "assurances that the State . . . will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan," as required under 42 U.S.C. § 7410(a)(2)(E)(i). *See* 76 Fed.

Reg. at 25,179/2-3 ("The program did not . . . provide assurances that it has adequate legal authority to apply to[] all pollutants newly subject to regulation . . ."); 75 Fed. Reg. at 82,431/2 (same). In particular, EPA noted that Texas had, in its August 2, 2010 letter responding to EPA's query about the applicability of States' PSD programs to GHGs, asserted that it lacked authority to revise its SIP to include GHGs. August 2, 2010 Letter at 1, JA67 (cited by 76 Fed. Reg. at 25,197/3). EPA reasonably relied on Texas's letter as a genuine representation of the State's position, even if Petitioners' current disavowal of that statement as part of Texas's ongoing litigation, having "nothing to do with" the State's original PSD SIP submission, Pet'rs' Br. at 44, seems to imply that Texas did not in fact mean what it was saying to the Agency. In any case, Petitioners' brief identifies no portion of Texas's PSD SIP that could be construed as either addressing the issue of newly regulated pollutants or providing assurances that Texas would address such pollutants as required under the CAA.

V. EPA Had Good Cause to Promulgate the Interim Rule Without Public Notice and Comment.

Should the Court reach the issue of whether EPA properly relied on the APA "good cause" exception in promulgating the Interim Rule, then EPA's good cause determination should be affirmed. Section 553(b)(3)(B) of the APA provides that an agency may issue a rule without notice and comment "when the agency for

good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). Here, EPA relied on the impracticability and public interest prongs of this provision. 75 Fed. Reg. at 82,458. Either provides a sufficient basis for the Interim Rule.[13]

Although the good cause exception to notice and comment rulemaking has been "narrowly construed and only reluctantly countenanced," the exemption does "excuse[] notice and comment in emergency situations, or where delay could result in serious harm." *Mack Trucks*, 682 F.3d at 93 (internal quotation marks and citations omitted). Here, EPA was confronted with Texas's own assertions in September 2010 that a failure to fill the gap in its PSD permitting authority would profoundly harm the State's economy and population by potentially delaying the issuance of up to 167 PSD permits within the next year.[14] 75 Fed. Reg. at

[13] Petitioners also criticize EPA on the ground that it "hid" its plan to issue the Interim Rule. *See* Pet'rs' Br. at 45. But any such allegations are irrelevant to whether good cause existed for purposes of the APA, which does not impose any requirements for agencies to disclose their internal, deliberative discussions outside of the notice-and-comment rulemaking context. Furthermore, as outlined *supra* at 15 n.3, EPA did not misrepresent its plans to issue the Interim Rule to this Court in the declaration submitted by Assistant Administrator McCarthy on October 28, 2010.

[14] The *post hoc* knowledge that no permits were issued to GHG-emitting sources under the Interim Rule, *see* Pet'rs' Br. at 49, is irrelevant; EPA had to make its decisions based on the information before it at the time, including the sworn statements of Texas's own officials in support of the State's stay motion in *CRR*.

82,458/2-3. The prospect of such economic harm justified use of the good cause exception to protect the public interest. *See Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (finding good cause where government action was needed to shield poultry producers, and their customers, from "economic harm and disruption"); *Mid-Tex Elec.*, 822 F.2d at 1132 (validating interim rule regarding electricity rates to avoid "irremedial financial consequences and regulatory confusion").

Moreover, EPA had less than 90 days to address this problem due to circumstances outside its control, including the automatic triggering of PSD applicability under 42 U.S.C. § 7475 and the late notice from Texas regarding alternative methods that EPA proposed to ensure the availability of PSD permitting authority. *See Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 582 (D.C. Cir. 1981) (upholding agency reliance on good cause exception where delays in meeting deadline were the result of third-party recalcitrance in cooperating with the agency's implementation efforts). EPA had no basis to assume that invocation of its error correction authority would be "appropriate" until after Texas's October 4, 2010 statements that it would neither revise its own SIP nor cooperate with EPA in putting a FIP in place pursuant to the GHG SIP Call, and after EPA had considered various possible courses of action in response. *See* 75 Fed. Reg. at

82,458. Given that fewer than 90 days then remained before the PSD GHG requirements would go into effect, on January 2, 2011, there was not sufficient time for the Agency to conduct notice-and-comment rulemaking. *See Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984) (finding it "entirely reasonable" for agency to invoke APA's good cause exception where "less than 90 days remained" before pending deadline by the time the agency was aware of need to issue rule). Notice-and-comment rulemaking was therefore impracticable in these circumstances, since delaying action past January 2, 2011 would "impose legal obligations on sources when sources have no legal means to fulfill those obligations." 75 Fed. Reg. at 82,458/3; *see also New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

/s/ *Madeline Fleisher*
MADELINE FLEISHER
Environmental Defense Section
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044

(202) 514-0242
Counsel for Respondents

Of Counsel:

HOWARD J. HOFFMAN
ELLIOTT ZENICK
SARA SCHNEEBERG
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Final Brief of Respondents was served, this 12th day of October, 2012, on all registered counsel, through the Court's CM/ECF system.

/s/ *Madeline Fleisher*
Madeline Fleisher
Counsel for Respondent EPA

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7(C), I hereby certify that the foregoing Final Brief of Respondents contains 13,999 words as counted by the Microsoft Office Word 2007 word processing system, and thus complies with the applicable word limitation.

/s/ *Madeline Fleisher*
Madeline Fleisher
Counsel for Respondent EPA

STATUTORY AND REGULATORY ADDENDUM

FEDERAL STATUTES

FEDERAL REGULATIONS

STATE REGULATIONS

5 U.S.C. § 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the

rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

42 U.S.C. § 7410

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to--

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions--

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will--

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator--

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan--

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for--

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover--

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel

burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided

that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations--

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary

nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator--

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition

approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409

(D) For purposes of this paragraph--

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub.L. 101-549, Title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that--

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that--

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the

requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines--

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may

be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified

stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof)

does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient

air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this

title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State--

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of

such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission

reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

42 U.S.C. § 7475

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless--

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(iii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's

recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period:

MAXIMUM ALLOWABLE INCREASE

[In micrograms per cubic meter]

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term “high terrain area” means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term “low terrain area” means any area other than a high terrain area.

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit

of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977, promulgate regulations respecting the analysis required under this subsection which regulations--

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

42 U.S.C. § 7479

For purposes of this part--

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to

undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

40 C.F.R. § 51.166(a), (b)(1)

(a)(1) Plan requirements. In accordance with the policy of section 101(b)(1) of the Act and the purposes of section 160 of the Act, each applicable State Implementation Plan and each applicable Tribal Implementation Plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) Plan revisions. If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) Required plan revision. If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) Plan assessment. The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) Public participation. Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in § 51.102.

(6) Amendments.

(i) Any State required to revise its implementation plan by reason of an amendment to this section, with the exception of amendments to add new maximum allowable increases or other measures pursuant to section 166(a) of the Act, shall adopt and submit such plan revision to the Administrator for approval no later than 3 years after such amendment is published in the Federal Register. With regard to a revision to an implementation plan by reason of an amendment to paragraph (c) of this section to add maximum allowable increases or other measures, the State shall submit such plan revision to the Administrator for approval within 21 months after such amendment is published in the Federal Register.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(7) Applicability. Each plan shall contain procedures that incorporate the requirements in paragraphs (a)(7)(i) through (vi) of this section.

(i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.

(iv) Each plan shall use the specific provisions of paragraphs (a)(7)(iv)(a)

through (f) of this section. Deviations from these provisions will be approved only if the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding provisions in paragraphs (a)(7)(iv)(a) through (f) of this section.

(a) Except as otherwise provided in paragraphs (a)(7)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases--a significant emissions increase (as defined in paragraph (b)(39) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(b) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(7)(iv)(c) through (f) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(c) Actual-to-projected-actual applicability test for projects that only involve existing emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(40) of this section) and the baseline actual emissions (as defined in paragraphs (b)(47)(i) and (ii) of this section) for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(d) Actual-to-potential test for projects that only involve construction of a

new emissions unit(s). A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(47)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(e) [Reserved]

(f) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(7)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(v) The plan shall require that for any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with requirements under paragraph (w) of this section.

(vi) [Reserved]

(b) Definitions. All State plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) Major stationary source means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal

dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(a) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source if the change would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds or NO_X shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(a) Coal cleaning plants (with thermal dryers);

(b) Kraft pulp mills;

(c) Portland cement plants;

(d) Primary zinc smelters;

(e) Iron and steel mills;

(f) Primary aluminum ore reduction plants;

(g) Primary copper smelters;

(h) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(i) Hydrofluoric, sulfuric, or nitric acid plants;

(j) Petroleum refineries;

(k) Lime plants;

(l) Phosphate rock processing plants;

(m) Coke oven batteries;

(n) Sulfur recovery plants;

(o) Carbon black plants (furnace process);

(p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

(s) Secondary metal production plants;

(t) Chemical process plants--The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(u) Fossil-fuel boilers (or combination thereof) totaling more than 250

million British thermal units per hour heat input;

(v) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more that 250 million British thermal units per hour heat input;

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

40 C.F.R. § 51.166(a), (b)(1) (1992)

(a)**(1) Plan requirements.** In accordance with the policy of section 101(b)(1) of the act and the purposes of section 160 of the Act, each applicable State implementation plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) Plan Revisions. If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) Required plan revision. If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) Plan assessment. The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) Public participation. Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in s 51.102.

(6) Amendments. (i) Any state required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph, shall adopt and submit such plan revision to

the Administrator for approval within 9 months after the effective date of the new amendments.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(b) Definitions. All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) "Major stationary source" means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(*a*) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source if the change would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(a) Coal cleaning plants (with thermal dryers);

(b) Kraft pulp mills;

(c) Portland cement plants;

(d) Primary zinc smelters;

(e) Iron and steel mills;

(f) Primary aluminum ore reduction plants;

(g) Primary copper smelters;

(h) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(i) Hydrofluoric, sulfuric, or nitric acid plants;

(j) Petroleum refineries;

(k) Lime plants;

(l) Phosphate rock processing plants;

(m) Coke oven batteries;

(n) Sulfur recovery plants;

(o) Carbon black plants (furnace process);

(p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

(s) Secondary metal production plants;

(t) Chemical process plants;

(u) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(v) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more that 250 million British thermal units per hour heat input;

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under Section 111 or 112 of the Act.

40 C.F.R. § 52.21(a), (b)(1)

(a)(1) Plan disapproval. The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in Subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(2) Applicability procedures.

(i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements. The Administrator has authority to issue any such permit.

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(a) through (f) of this section.

(a) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this

section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases--a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(b) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(c) through (f) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(c) Actual-to-projected-actual applicability test for projects that only involve existing emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(41) of this section) and the baseline actual emissions (as defined in paragraphs (b)(48)(i) and (ii) of this section), for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(d) Actual-to-potential test for projects that only involve construction of a new emissions unit(s). A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(48)(iii) of this section) of these units before the project equals or exceeds the significant amount for that

pollutant (as defined in paragraph (b)(23) of this section).

(e) [Reserved]

(f) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(c) through (d) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(v) For any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with the requirements under paragraph (aa) of this section.

(vi) [Reserved]

(b) Definitions. For the purposes of this section:

(1)(i) Major stationary source means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British

thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source, if the changes would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds or NO_X shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(a) Coal cleaning plants (with thermal dryers);

(b) Kraft pulp mills;

(c) Portland cement plants;

(d) Primary zinc smelters;

(e) Iron and steel mills;

(f) Primary aluminum ore reduction plants;

(g) Primary copper smelters;

(h) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(i) Hydrofluoric, sulfuric, or nitric acid plants;

(j) Petroleum refineries;

(k) Lime plants;

(l) Phosphate rock processing plants;

(m) Coke oven batteries;

(n) Sulfur recovery plants;

(o) Carbon black plants (furnace process);

(p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

(s) Secondary metal production plants;

(t) Chemical process plants--The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(u) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(v) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more that 250 million British thermal units per hour heat input, and

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under Section 111 or 112 of the Act.

40 C.F.R. § 52.21(a), (b)(1)

(a) Plan disapproval. The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in Subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) Definitions. For the purposes of this section:

(1)(i) "Major stationary source" means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of

this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source, if the changes would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(a) Coal cleaning plants (with thermal dryers);

(b) Kraft pulp mills;

(c) Portland cement plants;

(d) Primary zinc smelters;

(e) Iron and steel mills;

(f) Primary aluminum ore reduction plants;

(g) Primary copper smelters;

(h) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(i) Hydrofluoric, sulfuric, or nitric acid plants;

(j) Petroleum refineries;

(k) Lime plants;

(l) Phosphate rock processing plants;

(m) Coke oven batteries;

(n) Sulfur recovery plants;

(o) Carbon black plants (furnace process);

(p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

(s) Secondary metal production plants;

(t) Chemical process plants;

(u) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(v) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more that 250 million British thermal units per hour heat input, and

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under Section 111 or 112 of the Act.

30 Tex Admin. Code § 116.12

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas. In addition to the terms that are defined by the TCAA, and in § 101.1 of this title (relating to Definitions), the following words and terms, when used in Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Chapter 116, Subchapter C, Division 1 of this title (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 40 Code of Federal Regulations Part 60 or

61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) Baseline actual emissions--The rate of emissions, in tons per year, of a federally regulated new source review pollutant.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five-year period immediately preceding when the owner or operator begins actual construction of the project. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(B) For an existing facility (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the facility actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the ten-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received for a permit. The rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply with the exception of those required under 40 Code of Federal Regulations Part 63, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(C) For a new facility, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and for all other purposes during the first two years following initial operation, shall equal the unit's potential to emit.

(D) The actual average rate shall be adjusted downward to exclude any non-

compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual average emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as resulting from planned maintenance, startup, or shutdown activities; historically unauthorized; and subject to reporting under Chapter 101 of this title (relating to General Air Quality Rules) shall be included to the extent that they have been authorized, or are being authorized.

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or operator may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter shall be identified and compliance required in a condition in a permit that is legally enforceable.

(A) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter.

(B) If design information is not available for a process unit, the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(C) Efficiency of a process unit is not a basic design parameter.

(5) Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

(6) Building, structure, facility, or installation--All of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities are considered to be part of the same industrial grouping if they belong to the same “major group” (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(7) Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

(8) Clean coal technology demonstration project--A project using funds appropriated under the heading “Department of Energy-Clean Coal Technology,” up to a total amount of $2.5 billion for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States

Environmental Protection Agency. The federal contribution for a qualifying project shall be at least 20% of the total cost of the demonstration project.

(9) Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

(11) Contemporaneous period--For major sources the period between:

(A) the date that the increase from the particular change occurs; and

(B) 60 months prior to the date that construction on the particular change commences.

(12) De minimis threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment or prevention of significant deterioration review. The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(13) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility

power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(14) Federally regulated new source review pollutant--As defined in subparagraphs (A)-(D) of this paragraph:

(A) any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the United States Environmental Protection Agency;

(B) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), § 111;

(C) any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI; or

(D) any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, § 112 or added to the list under FCAA, § 112(b)(2), which have not been delisted under FCAA, § 112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, § 108.

(15) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, § 7411, and that reflects the following:

(A) the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation that is achieved in practice by a

specific class or category of facilities, whichever is more stringent.

(16) Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(17) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs) for which a national ambient air quality standard has been issued. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) § 51.166(b)(1). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR § 51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR § 51.165(a)(1)(iv)(C).

(18) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations § 51.166(b)(1) and (23), respectively.

Figure: 30 TAC §116.12(18)(A)

TABLE I
MAJOR SOURCE/MAJOR MODIFICATION
EMISSION THRESHOLDS

POLLUTANT designation[1]	MAJOR SOURCE tons/year	SIGNIFICANT LEVEL[2] tons/year	OFFSET RATIO minimum
OZONE (VOC, NO_X)[3]	100	40	1.10 to 1
I marginal	100	40	1.15 to 1
II moderate	50	25	1.20 to 1
III serious	25	25	1.30 to 1
IV severe			
CO			
I moderate	100	100	1.00 to 1[4]
II serious	50	50	1.00 to 1[4]
SO_2	100	40	1.00 to 1[4]
PM_{10}			
I moderate	100	15	1.00 to 1[4]
II serious	70	15	1.00 to 1[4]
NO_x[5]	100	40	1.00 to 1[4]
Lead	100	0.6	1.00 to 1[4]

[1] Texas nonattainment area designations as defined in §101.1(70) of this title.

[2] The significant level is applicable only to existing major sources and shall be evaluated after netting, unless the applicant chooses to apply nonattainment new source review (NNSR) directly to the project. The appropriate netting triggers for existing major sources of NO_X and VOC are specified in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) and for other pollutants are equal to the significant level listed in this table.

[3] VOC and NO_X are precursors to ozone formation and should be quantified individually to determine whether a source is subject to NNSR under §116.150 of this title.

[4] The offset ratio is specified to be greater than 1.00 to 1.
VOC = volatile organic compounds
NO_X = oxides of nitrogen
NO_2 = nitrogen dioxide
CO = carbon monoxide
SO_2 = sulfur dioxide
PM_{10} = particulate matter with an aerodynamic diameter less than or equal to ten microns

[5] Applies to the NAAQS for nitrogen dioxide (NO_2).

(B) A physical change or change in the method of operation shall not include:

(i) routine maintenance, repair, and replacement;

(ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, § 2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;

(iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, § 7425;

(iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;

(vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition that was established after December 21, 1976);

(vii) any change in ownership at a stationary source;

(viii) any change in emissions of a pollutant at a site that occurs under an existing plant-wide applicability limit;

(ix) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated;

(x) for prevention of significant deterioration review only, the installation or operation of a permanent clean coal technology demonstration project that constitutes re-powering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis; or

(xi) for prevention of significant deterioration review only, the reactivation of a clean coal-fired electric utility steam generating unit.

(19) Necessary preconstruction approvals or permits--Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations that are part of the applicable state implementation plan.

(20) Net emissions increase--The amount by which the sum of the following exceeds zero: the project emissions increase plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases. Baseline actual emissions shall be used to determine emissions increases and decreases.

(A) An increase or decrease in emissions is creditable only if the following conditions are met:

(i) it occurs during the contemporaneous period;

(ii) the executive director has not relied on it in issuing a federal new source review permit for the source and that permit is in effect when the increase in emissions from the particular change occurs; and

(iii) in the case of prevention of significant deterioration review only, an increase or decrease in emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount

of maximum allowable increases remaining available.

(B) An increase in emissions is creditable if it is the result of a physical change in, or change in the method of operation of a stationary source only to the extent that the new level of emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable.

(C) A decrease in emissions is creditable only to the extent that all of the following conditions are met:

(i) the baseline actual emission rate exceeds the new level of emissions;

(ii) it is federally enforceable at and after the time that actual construction on the particular change begins;

(iii) the executive director has not relied on it in issuing a prevention of significant deterioration or a nonattainment permit;

(iv) the decrease has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and

(v) in the case of nonattainment applicability analysis only, the state has not relied on the decrease to demonstrate attainment or reasonable further progress.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(21) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, § 7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and Trading; or

Discrete Emission Credit Banking and Trading), except as provided for in § 116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(22) Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable and established in a plant-wide applicability limit permit under § 116.186 of this title (relating to General and Special Conditions).

(23) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit. The plant-wide applicability limit effective date for a plant-wide applicability limit established in an existing flexible permit is the date that the flexible permit was issued.

(24) Plant-wide applicability limit major modification--Any physical change in, or change in the method of operation of the plant-wide applicability limit source that causes it to emit the plant-wide applicability limit pollutant at a level equal to or greater than the plant-wide applicability limit.

(25) Plant-wide applicability limit permit--The new source review permit that establishes the plant-wide applicability limit.

(26) Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established at a major stationary source.

(27) Potential to emit--The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations § 51.165(a)(1)(viii), do not count in determining the potential to emit for a stationary source.

(28) Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions

increases and decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(29) Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include unauthorized emissions from planned maintenance, startup, or shutdown activities, which were historically unauthorized and subject to reporting under Chapter 101 of this title, to the extent they have been authorized, or are being authorized; and fugitive emissions to the extent quantifiable; and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

(30) Project emissions increase--The sum of emissions increases for each modified or affected facility determined using the following methods:

(A) for existing facilities, the difference between the projected actual emissions and the baseline actual emissions. In calculating any increase in emissions that results from the project, that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth may be excluded from the project emission increase. The potential to emit from the facility following completion of the project may be used in lieu of the projected actual emission rate; and

(B) for new facilities, the difference between the potential to emit from the facility following completion of the project and the baseline actual emissions.

(31) Replacement facility--A facility that satisfies the following criteria:

(A) the facility is a reconstructed unit within the meaning of 40 Code of Federal Regulations § 60.15(b)(1), or the facility replaces an existing facility;

(B) the facility is identical to or functionally equivalent to the replaced facility;

(C) the replacement does not alter the basic design parameters of the process unit;

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a new facility. No creditable emission reductions shall be generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

(32) Secondary emissions--Emissions that would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(33) Significant facility--A facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant.

(34) Small facility--A facility that emits or has the potential to emit the plant-wide applicability limit (PAL) pollutant in an amount less than the significant level for that PAL pollutant.

(35) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§ 7401 et seq.

(36) Temporary clean coal technology demonstration project--A clean coal technology demonstration project that is operated for a period of five years or less,

and that complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

31 Tex. Admin. Code § 116.3(a)(13) (1992)

(13) The proposed facility shall comply with the prevention of significant deterioration (PSD) of air quality regulations promulgated by the Environmental Protection Agency (EPA) in the Code of Federal Regulations (CFR) at 40 CFR, § 52.21 as amended October 17, 1988, and the definitions for protection of visibility promulgated at 40 CFR, § 51.301, hereby incorporated by reference, except for the following paragraphs: 40 CFR, §52.21(j), concerning control technology review; 40 CFR, §52.21(1), concerning air quality models; 40 CFR, § 52.21(q), concerning public notification (provided, however, that a determination to issue or not issue a permit shall be made within one year after receipt of a complete permit shall be made within one year after receipt of a complete permit application so long as a contested case hearing has not been called on the application); 40 CFR, § 52.21(r)(2), concerning source obligation; 40 CFR, § 52.21(s), concerning environmental impact statements; 40 CFR, § 52.21(u), concerning delegation of authority; and 40 CFR, § 52.21(w), concerning permit rescission. The term ‘executive director‘ shall replace the word ‘administrator,‘ except in 40 CFR, §52.21(b)(17), (f)(1)(v), (f)(3), (f)(4)(i), (g), and (t). ‘administrator or executive director‘ shall replace ‘administrator‘ in 40 CFR, § 52.21(b)(3)(iii), and ‘administrator and executive director‘ shall replace ‘administrator‘ in 40 CFR, §52.21(p)(2). All estimates of ambient concentrations required under this paragraph shall be based on the applicable air quality models and modeling procedures specified in the EPA Guideline on Air Quality Models, as amended, or models and modeling procedures currently approved by EPA for use in the state program, and other specific provisions made in the state PSD state implementation plan. If the air quality impact model approved by EPA or specified in the guidelines is inappropriate, the model may be modified or another model substituted on a case-by-case basis, or a generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval of the administrator of the EPA. Copies of 40 CFR, § 52.21 and 40 CFR, § 51.301 are available upon request from the Texas Air Control Board, 6330 U.S. Highway 290 East, Austin, Texas 78723.